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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 423

JOHN D. GLYNN,

Petitioner,

vs.

MARJORIE DOCTORMAN DUBIN, aka MARJORIE DOCTORMAN and DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondents.

Petition for a Writ of Certiorari to the District Court of the Third Judicial District in and for Salt Lake County, State of Utah.

JOHN D. GLYNN,
Beverly Hills, California,
9171 Wilshire Boulevard,
Appearing in Pro. Se.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

JOHN D. GLYNN,

Appellant,

vs.

MARJORIE DOCTORMAN DUBIN, aka MARJORIE DOCTORMAN and DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondents.

Petition for a Writ of Certiorari to the District Court of the Third Judicial District in and for Salt Lake County, State of Utah.

Petitioner prays that a writ of certiorari issued to review the judgment of the Supreme Court of the State of Utah, entered in the above-entitled case on March 27, 1962, and decision on timely petition for rehearing dated May 14, 1962, but issued May 15, 1962 and remitted on said date to the District Court of the Third Judicial District in and for Salt Lake County, State of Utah.

Opinions Below.

The Findings of Fact and Conclusions of Law and Decree of the District Court are not reported but are printed in Appendix A. The opinion of the Supreme

Court of the State of Utah and its opinion or order on the petition for rehearing are not yet reported but are printed in Appendix B, pp. 7-11.

Jurisdiction.

The judgment of the Supreme Court of the State of Utah was entered on March 27, 1962 (*infra*, Appendix B, pp. 7-11). A timely petition for rehearing was denied on May 14, 1962 (Appendix B, p. 7). On August 9, 1962, pursuant to Motion Mr. Justice Hugo Black of the Supreme Court of the United States signed an order extending your Petitioner's time to and including September 11, 1962 for the filing of the instant petition for writ of certiorari. The District Court of Salt Lake County, State of Utah upon posting of a bond has granted a stay as to the execution of any proceedings to enforce the judgment of the Supreme Court of Utah pending a determination of Petitioner's Petition for Writ of Certiorari.

The jurisdiction of the Court is invoked under 28 U. S. C. Section 1257(3).

Questions Presented.

The question presented by the instant Petition is whether or not the Utah Supreme Court can deprive Petitioner of his property rights based upon an adjudication made in another case heard by default (in which Petitioner was not mentioned) and which case was filed *after* Petitioner became a record owner of the property involved and in which case your Petitioner *was not named as a party, was not interpleaded* (though

the existence of Petitioner's interest of record was known by Respondent's counsel before the time of filing) and in which case Petitioner *was not served personally or constructively with any type of process or given any notice* as to possible adjudication of his property rights. It is the contention of your Petitioner that the force and effect of the decision of the Utah Supreme Court is to deprive your Petitioner of his property without due process of law contrary to the 14th Amendment of the Constitution of the United States and contrary to decisions of this Court. This denial of due process first occurred as a result of the opinion of the Supreme Court of Utah and its subsequent denial of Petitioner's Petition for Rehearing on the merits, when such Court held that Petitioner's undisputed record ownership of property located in the State of Utah was lost to him as the result of an adjudication in an action to which Petitioner *was not named as a party*, not mentioned in the pleadings nor served personally or constructively with process in said action.

Statutes Involved:

The statute involved is the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "No state shall deprive any person of life, liberty, or property without due process of law."

Other statutes involved are those cited herein in connection with the Fraudulent Conveyance Act of Utah and statutes relating to a *lis pendens* under Utah law.

Statement of the Case.

A concise statement of the case containing facts material to a consideration of the constitutional question presented is as follows: In November or December, 1958, your Petitioner as an attorney licensed to practice law in the State of California, was retained by Martin F. Dubin, M.D. to represent him in connection with personal problems that had arisen between Dr. Dubin and his wife (Respondent herein). Dr. Dubin at that time was doing his residency at Santa Fe Hospital in Los Angeles. Because of his low income, as a result of such residency, your Petitioner told Dr. Dubin that financial arrangements could be made at a later date. Shortly thereafter, and without any notice to Dr. Dubin, Mrs. Dubin moved to Salt Lake City, taking all personal belongings of both parties, and commenced an action for separate maintenance against Dr. Dubin in the District Court of Salt Lake County. In said action your Petitioner acted as co-counsel with E. R. Callister, Esq., of the Utah Bar who was then Attorney General of the State of Utah but who is now a justice of the Supreme Court of Utah. Upon Justice Callister's appointment to the judiciary his successor, Walter Budge, as Attorney General, became your Petitioner's co-counsel.

During 1959 the action filed by Mrs. Dubin was amended to one for divorce and in December, 1959 your Petitioner and Dr. Dubin flew to Salt Lake City for trial. At this time Dr. Dubin was indebted to Petitioner for extensive legal services which not only involved the complex separate maintenance action later changed to divorce, but also the establishment of Dr.

Dubin's medical practice in Los Angeles County and other business activities in Los Angeles. As a result of this indebtedness on December 7, 1959 Dr. Dubin conveyed to your Petitioner by Quit Claim Deed his interest in a residence owned in joint tenancy by Dr. Dubin and his wife in Salt Lake City. This deed to your Petitioner was recorded in Salt Lake County on said date and your Petitioner simultaneously cancelled an agreed upon figure of $3,000 owing to him for legal services and further your Petitioner paid Dr. Dubin the sum of $100.00 and executed in his favor a Promissory Note for $5,000; the combination of the $100.00, cancellation of $3,000 of indebtedness and execution of said Promissory Note representing approximate one-half of the equity Dr. Dubin and his wife had in the property. (The Promissory Note was placed in evidence but withdrawn by stipulation at the conclusion of the trial of the instant action by Dr. Dubin.) As to what is a "fair consideration under Utah law as the consideration for property see Section 25-1-3, Utah Code Annotated 1953 (Appendix E, p. 18). This equity was determined by your Petitioner and Dr. Dubin on said date by personal inspection of the premises and a visit to Deseret Federal Savings and Loan Association to determine the amount still owing on said property by way of mortgage or deed of trust. On December 7, 1959 your Petitioner and his co-counsel Walter Budge, Attorney General, advised one of Respondent Marjorie Doctorman Dubin's co-counsel, Bernard Rose, in Mr. Budge's office that Dr. Dubin had executed said Quit-Claim Deed to your petitioner and further that Dr. Dubin had received the $100.00 in cash plus the $5,000 Promissory Note.

On December 8, 1959, your Petitioner and his Utah co-counsel, Attorney General Walter Budge, were successful in having the wife's divorce action dismissed, the Utah District Court agreeing that it had no jurisdiction of the action since Mrs. Dubin had not lived in Salt Lake City four (4) months prior to the filing of the original action for separate maintenance later changed to an action for divorce.

On December 8, 1959, prior to the dismissal of the action (during the lunch hour) but after the court indicated that it was prepared to dismiss the action at approximately 2 P.M., Mrs. Dubin filed a new action for divorce and allegedly filed a *lis pendens* but in which your Petitioner was not mentioned nor was his property interest of record disclosed, although the same was known to the attorney who filed the *lis pendens*. However, prior to a recess of the morning session your Petitioner withdrew as counsel of record for Dr. Dubin (with the Court's permission) and neither your Petitioner or Dr. Dubin were personally served with process in the second action while in the State of Utah. On December 8, 1959, at the request of Petitioner, a second identical Quit Claim Deed was executed by Dr. Dubin in favor of your Petitioner and recorded and your Petitioner executed and had recorded an identical Promissory Note, it being the understanding of the parties that only one Promissory Note would be enforceable. Payments were made by your Petitioner to Dr. Dubin as required by the terms of the Promissory Note dated December 7, 1959. [See T. R. pp. 44-45—Testimony of Martin F. Dubin and Testimony of your Petitioner T. R. p. 51.]

Upon your Petitioners return to Los Angeles he was advised by his Utah counsel, Walter Budge, that the December 7, 1959 Quit Claim Deed to him by Dr. Dubin was valid and that a whole line of Utah cases and cases from other jurisdictions supported such a position including several decisions of the Supreme Court of the State of Utah. See *Adamson v. Adamson*, 55 Utah 544, 188 Pac. 635, *Neilson v. Neilson*, 30 Utah 391, 85 Pac. 429, and cases and authorities cited by Petitioner in his Brief filed with the Supreme Court of the State of Utah, pages 28 through 34 and particularly the annotation relating to attorney's fees as consideration for a conveyance found at 45 A. L. R. 2d 514.

Dr. Dubin did not make an appearance at the second divorce action filed on December 8, 1959 but he was served with process in the State of California. Your Petitioner was not named as a party to said action nor was his interest in the property involved disclosed in any pleadings filed with the Utah District Court nor was your Petitioner's interest of record in the property mentioned at the default hearing on said action though Mrs. Dubin and her two co-counsel had *personal knowledge* of the conveyance made to your Petitioner by Dr. Dubin. [See Ex. 10—Transcript of record in the second divorce action filed December 8, 1959, Action No. 123578.] On January 25, 1960 your Petitioner wrote the Utah District Court stating that he was Dr. Dubin's attorney, but at no time did your Petitioner indicate he was appearing as the attorney of record for Dr. Dubin in the second divorce action filed by Mrs. Dubin. [See Ex. 9.] Further, said letter was sent from Los Angeles on January 25, 1960 which was three days after the default hearing held in the second divorce action on

January 22, 1960. At said default divorce hearing the property involved was awarded to Mrs. Dubin "free and clear of any claims of Dr. Dubin." No mention was made in the decree of any interest in said property held by your Petitioner.

Since the property was originally held in joint tenancy by Dr. Dubin and his wife, your Petitioner sometime after the conveyance to him by Dr. Dubin decided to terminate the joint tenancy by legal process and therefore, commenced an action in the Utah District Court for partition and sale of the property involved. The responsive pleadings of Mrs. Dubin are rather ambiguous but in her answer she admitted that a cause of action was stated by your Petitioner for partition of real property, but made certain allegations which liberally construed normally would be *a part of* the requisite allegations if her idea was to allege that the conveyance from Dr. Dubin to your Petitioner was fraudulent. However, many essential allegations were not made as required by the Fraudulent Conveyance Act at 25-1-8, Utah Code Annotated, 1953. Said code section in pertinent part provides:

> "Every conveyance or assignment in writing or otherwise . . . made with the intent to delay, hinder or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands . . . as against the person hindered delayed or defrauded shall be void." (See Appendix E, page 16, for complete quotation of said code section.)

Section 25-1-13 of said Act further provides:

> 25-1-13 *Bona fide purchasers not affected*
>
> "The provisions of this Chapter shall not be construed to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the *fraudulent intent of his immediate grantor, or of the fraud* rendering void the title of such grantor" (emphasis supplied).

Further Section 25-1-7 of said Act provides:

> 25-1-7 *Conveyance to hinder, delay, defraud creditors*
>
> "Every conveyance made, and every obligation incurred, with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors as fraudulent as to both present and future creditors."

See also Appendix E starting at page 16 for other pertinent sections of said Act.

In the pre-trial order dictated by the Utah District Court on October 19, 1960 [T. R. p. 22] the Court held that in view of Mrs. Dubin's admission that the property was held in joint tenancy it was no defense to Petitioner's action for partition for Mrs. Dubin to allege that the conveyance was fraudulent because it was an effort to convey property that belonged to defendant, the court holding that if the property once belonged to Mrs. Dubin that she had made a gift of part of it to Dr. Dubin in the joint tenancy deed. Mrs. Dubin had made conflicting statements in her pleadings and interrogatories

of both divorce actions as to when the joint tenancy deed was executed and recorded and as to the source of funds paid when the property was purchased. [See Testimony of your Petitioner T. R. p. 59.] Later, on November 2, 1960, the same Utah District Judge allowed paragraph 9 of the pre-trial order to be amended [T. R. p. 29] to state that Mrs. Dubin claimed that although the property was held in joint tenancy, that she was the equitable owner of the entire property. However, in said pre-trial order the court stated that it had "grave doubt about the validity of this contention" and left it for the trial court to determine whether or not it amounted to a defense. [See T. R. p. 58 wherein at the time of trial of the instant action your Petitioner objected to a line of questioning by Respondent's counsel on the basis that said questions would permit Respondent to go behind the joint tenancy deed in violation of the parol evidence rule. The court permitted the questions but on the basis that the questions were asked to show your Petitioner's knowledge of the land prior to December 7, 1959. Inferentially, it can be said the trial judge would not allow the joint tenancy deed to be attacked.]

In May, 1961, your Petitioner brought his action to trial for partition of the real property and without question put on evidence constituting a cause of action for partition of property formerly held in joint tenancy. Upon the conclusion of Petitioner's case *and without any evidence being presented* by the instant Respondent (except certain exhibits put into evidence by stipulation), Mrs. Dubin was successful in having your Petitioner's action for partition dismissed and an adjudication that the property belonged entirely to her. This conclu-

sion or decree is inconsistent with the Utah definition of a "creditor" required under the Fraudulent Conveyance Act. See Section 25-1-1, Utah Code Annotated 1953 (Appendix E, p. 18), or *Adamson v. Adamson, supra* where it was held that a person such as Mrs. Dubin was not a creditor where it was not shown that she had procured a judgment against Dr. Dubin or he was insolvent. The Conclusions of Law [T. R. p. 72] state that your Petitioner took the property "with knowledge of the claim of the defendant Marjorie Doctorman Dubin, and the Plaintiff was not a purchaser in good faith." There was no evidence presented by Respondent on this point except *lis pendens* stipulated into evidence, and Petitioner's own witnesses. The court *did not* make a finding of fraudulent intent of your Petitioner's grantor as required by Section 25-1-8, Utah Code Annotated 1953 (Appendix E, p. 16). The Court further concluded that Plaintiff took the property subject to the *lis pendens* filed in the first and second divorce actions, file Nos. 119467 and 123578, respectively. The position of the court on this point is absolutely contrary to the explicit terms of Section 78-40-3, Utah Code Annotated, 1953 (see Appendix G, p. 20) pertaining to default judgments, which states that the default judgment cannot be entered until evidence of plaintiff's title and possession has been put on and that the "judgment shall be conclusive against all the persons named in the summons and complaint who have been served and against all such unknown persons as stated in the complaint and summons who have been served by publication." *In the instant case, Petitioner was not named in the complaint, was known and was not served either personally or by publication.*

Further, the Court did not state how your Petitioner could have taken the Quit Claim Deed of December 7, 1959 subject to the two *lis pendens filed at a later date* (filed December 8 and 10, 1959), nor did the Court determine the effect of the dismissal of the first divorce action applicable to the earlier *lis pendens*. It was the position of your Petitioner that since he had actual knowledge of the pleadings in the first action that the effect of the first filed *lis pendens* was immaterial, and in any event that Dr. Dubin had a right under Utah law to convey his interest in the joint tenancy property provided the conveyance was not fraudulent. See *Adamson v. Adamson, supra; Anderson v. Anderson,* 54 Utah 309, 181 Pac. 168; *Neilson v. Peterson,* 30 Utah 391, 85 Pac. 429; and *Neilson v. Neilson, supra.* This is borne out by Section 30-4-4, Utah Code Annotated 1953 (see Appendix D, p. 15) pursuant to which Respondent when she filed the first action could have obtained from the District Court an order enjoining and restraining Dr. Dubin from disposing of or encumbering the real property involved in the action and thereby creating a lien on the property as to any judgment rendered in the action from the time of filing of such order with the County Recorder. Such an order was not obtained and since the District Court held on December 8, 1959 that the first action could not properly be changed to an action for divorce from that of separate maintenance it can be said that said code section inferentially, if not directly, states that on December 7, 1959 unless such an order had been obtained and filed, a conveyance could be made. (See *Adamson v. Adamson, supra,* where it is stated that the husband had a right to sell his interest in real prop-

erty. If a *lis pendens* would achieve the same result there would be no necessity for such code section. *In this respect it is important to note that the Utah lis pendens statute*, Chapter 40, Section 78-40-2, Utah Code Annotated 1953 (see Appendix F, p. 19) ***does not have the effect of creating a lien but merely puts a person on constructive notice of the pendency of the action.*** See also *Beesley v. Badger*, 66 Utah 194, 240 Pac. 458. The trial judge who heard your Petitioner's action was the same trial judge who had heard the second default divorce action. Petitioner assumed this fact would not prejudice his own case but as a result of comments made by such judge your Petitioner may have been in error. [See T. R. pp. 66, 67 and p. 37 Transcript of Testimony in the instant action No. 125317.] It should be noted that the Utah District Court failed to find on material facts or issues which are necessary in order to assert the defense of the conveyance being fraudulent under the Fraudulent Conveyance Act at 25-1-8, Utah Code Annotated, 1953, *supra*, and Appendix E, page 16. (See Brief of Plaintiff-Appellant, pp. 25 and 26.) These findings were not made even though defendant's (Respondent herein) *counsel stated in open court that he was satisfied with the evidence.* [T. R. p. 66.] It should also be noted that the *lis pendens* [Ex. 4] allegedly filed at 1:45 P.M. on December 8, 1959 (Respondent put on *no evidence* to substantiate the recording time) only mentions that Marjorie Dubin had filed an action against Martin F. Dubin "to recover such outstanding title as may now be *in the said defendant* (Martin Dubin.)" (emphasis supplied). No mention is made in said *lis pendens* of any interest your Petitioner might have of record in said property. Later on December 10, 1959,

another *lis pendens* [Ex. 3] was filed by Mrs. Dubin which stated that an action was pending to recover "such outstanding title as may now be in the said defendant (Dr. Dubin) or in John T. (sic) Glynn, his attorney of record, by virtue of attorney's lien or conveyance purporting to protect the same. . . ." (Your Petitioner was not Dr. Dubin's attorney of record in said action (No. 123578) nor a party to said action and counsel who signed said *lis pendens* was well aware of said facts.) Said *lis pendens*, however, illustrates that Mrs. Dubin's counsel knew of the conveyance of December 7, 1959 to your Petitioner when the said *lis pendens* was recorded but yet as an officer of the court failed to disclose Petitioner's interest of record at the time of the default divorce hearing some 12 days later. [See Ex. 10 Transcript of Testimony in Case No. 123578.] Marjorie Dubin failed to bring in your Petitioner as a party to her second divorce action although under Utah law such procedure is permissible *and required* if she hoped to obtain the result rendered by the District Court. See Section 78-40-3, Utah Code Annotated, 1953. (Appendix G, p. 20.) It should be further noted that the District Court stated at the conclusion of the trial (Petitioner's) that in order for Petitioner to prevail he must be innocent of her (Respondent's) rights." [T. R. p. 65—Transcript of Testimony in Case No. 125317.] The "right" the trial judge made reference to was defined by him as "a right to have the property disposed of in the divorce action." [T. R. p. 65—Transcript of Testimony in Case No. 125317.] This position of the trial judge is inconsistent with Section 78-40-2 Utah Code Annotated, 1953 (Appendix F, p. 19) which says a *lis pendens* only gives notice

of pendency of the action. If Respondent desired to affirmatively bring in your Petitioner or set aside the conveyance made to your Petitioner she could have invoked the provisions of Section 25-1-16 of Utah Code Annotated, 1953. (Appendix F, p. 17.) This she did not do. See also 24 A. L. R. 2d 395. This position of the trial judge showed the court's unawareness of the required pleading and proof of a fraudulent intent on part of the grantor of a conveyance or the necessity of showing that if the grantor had such fraudulent intent that your Petitioner as grantee had previous notice of the fraudulent intent of his grantor or of the fraud rendering void the title of such grantor. Unless the grantor had such fraudulent intent it is immaterial that your Petitioner knew of Respondent's claims or whether or not he was a purchaser in good faith. Conclusion No. 1 of the trial court as to good faith (Appendix A, p. 4) is meaningless and further is not supported by any evidence. See Section 25-1-13 Utah Code Annotated, 1953, *supra*, which clearly states that it is necessary to show that the purchaser had previous knowledge or notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor. (See *Smith v. Edwards* (Utah), 1932, 81 Utah 244, 17 P. 2d 264, *Heidelberg v. Smith* (1959), 214 Ga. 785, 107 S. E. 2d 844, and pp. 9-12 of Brief of Plaintiff-Appellant filed with the Supreme Court of the State of Utah.) Furthermore, when the action was dismissed on December 8, 1959, there was no action which was then still pending which had been pending when the Quit Claim Deed was executed and recorded on December 7, 1959. Further, there had been no order obtained by

Respondent restricting Dr. Dubin from encumbering or disposing of his interest in the real property as is explained above. It should also be noted that similar deeds and circumstances were upheld in *Adamson v. Adamson,* Utah, *supra, a divorce action* where the father-grantee *knew* of the divorce action and *Sun Insurance Co. v. White,* 123 Cal. 196, 55 Pac. 902, in which plaintiff-grantee *knew of the divorce* action and in which a *lis pendens had been filed.*

An appeal was taken by your Petitioner to the Utah Supreme Court and after being under submission for almost one year, the Supreme Court affirmed the District Court, but in so doing for the *first time* stated in effect that since your Petitioner was counsel for Dr. Dubin at one time, that Dr. Dubin could not make any conveyance to your Petitioner irrespective of the fact that the action in which your Petitioner was co-counsel for Dr. Dubin was dismissed and that the District Court had not made any findings or conclusions that the conveyance was fraudulent under Utah law or other findings essential to such a conclusion. Importantly the Supreme Court of Utah stated (see last paragraph of opinion, Appendix B, pp. 10-11) that Petitioner's rights in the property were determined by the adjudication of property rights in the second default divorce action (which action was filed and adjudicated *after* the conveyance of December 7, 1959 to your Petitioner had been made and recorded and in which action your Petitioner *was not named as a party or served with process or interpleaded,* which could have been done under the Utah law.) The Utah Supreme Court failed to point out or consider that the *lis pendens* filed on December 8,

1959 as to the second divorce action (No. 125317) only stated that the action was to recover any outstanding title in Dr. Martin F. Dubin and that no mention was made in such *lis pendens* or to the District Court at the default hearing of the second divorce action as to the then outstanding title standing in the name of your Petitioner. It was always the Petitioner's position that the existence of the *lis pendens* was not material to a determination of the issues. (See Utah *lis pendens* statute, Appendix F, p. 19, and Point IX of Brief of Plaintiff-Appellant, pp. 34-35.) See also discussion above of effect of Section 30-4-4 Utah Code Annotated, 1953 *supra* (Appendix D, p. 15) Petitioner had every right to believe that if his rights in the property were to be determined that he would be given notice of such contemplated determination and an opportunity to appear and be heard. The net result of the action of the Utah Supreme Court was to deprive your petitioner of his property without due process of law. The Utah Supreme Court did not cite any case or statutory authority for its position and further failed to explain away two contrary Utah cases and Utah statutory authority and cases and authorities from other jurisdictions.

The federal question was first raised on Petition for Rehearing as Point I of Petitioner's Brief in Support of Rehearing. This was the *first time* petitioner could raise the constitutional issue since it was not brought out until the opinion of the Utah Supreme Court was rendered.

Petitioner had assumed that the Supreme Court of Utah would rule on the merits as to the points raised in his Brief on appeal, particularly those points or is-

sues relating to the failure of Respondent to properly plead and prove a defense under the Fraudulent Conveyance Act, at 25-1-8 Utah Code Annotated, 1953, *supra* and Appendix E, page 16, and the failure of the court to find on material issues. In this your Petitioner was mistaken, since the Utah Supreme Court did not answer any points raised by your Petitioner's Brief but instead based its decision on an entirely different ground not specifically or even generally relied upon by the trial court as a basis for its decision. On page 6 of Petition for Rehearing it is stated as follows:

> "The main point of the instant petition for rehearing is that Plaintiff-Appellant has been denied due process of law. The Supreme Court of the United States has decided many cases in which the question was whether or not the type of notice given *to a party to an action* was sufficient to constitute due process. In the instant case Plaintiff Appellant was not a party to either of said actions and was not given any notice that his rights under his deed were to be determined by either of said actions."

On page 9 of Petition for Rehearing your petitioner stated:

> "In the instant case the Judgment of the Utah Supreme Court could not have been given without depriving Plaintiff-Appellant of due process of law. The basis of the Court's opinion was to hold that the judgment rendered by the trial court in the action filed December 8, 1959, determined the instant Plaintiff-Appellant's rights even though the instant Plaintiff-Appellant *was not named as*

a party in said suit, was not personally or constructively served with process and the deed under which the instant Plaintiff-Appellant claims his rights was not mentioned in the pleadings nor at the time of trial, even though the existence of such deed was known at the time of filing of the action and trial thereof by the instant Defendant-Respondent and her two counsel. Under Utah law, the instant Defendant-Respondent could have made the instant Plaintiff-Appellant a party to her action filed on December 8, 1959, but she did not choose to do so and to permit her now to use the decision in that action to deprive Plaintiff-Appellant of his property is a flagrant violation of due process of law."

The Petition for Rehearing was denied with the Court stating that the Petition for Rehearing and arguments of counsel *had been considered.* (See Appendix B, p. 7.) Attached to Certificate of L. M. Cummings, Clerk, Supreme Court of Utah, and attached hereto as Appendix C, pp. 12-14, is a copy of your Petitioner's letter dated May 9, 1962, addressed to the Clerk of the Supreme Court of the State of Utah requesting that attached copies of said letter be circulated to each Justice of the Court, prior to the Court's decision on the Petition for Rehearing, which clearly proves that the constitutional issue was, or should have been foremost in the various Justice's minds.

There are numerous United States Supreme Court cases holding that a constitutional issue can be brought forth in a Petition for Rehearing if up to that time the decision of the lower court has not raised the issue.

In view of the language used by the Utah Supreme Court in denying the Petition for Rehearing on its merits and in view of Petitioner's letter of May 9, 1962 delivered to each Justice of the Utah Supreme Court and his Petition for Rehearing there can be no doubt that the constitutional issue was timely raised and considered by the Utah Supreme Court.

Grannis v. Ordean, 34 S. Ct. 779, 234 U. S. 385; 58 L. Ed. 1363;

Susquehanna Boom Co. v. West Branch Boom Co. (Pa. 1884), 3 S. Ct. 438, 110 U. S. 57, 28 L. Ed. 69;

Lynch v. People of New York, ex rel. Pierson (1934), 55 S. Ct. 16, 293 U. S. 52;

Montana v. Rice, 204 U. S. 291, 27 S. Ct. 281, 51 L. Ed. 490;

Wilson v. Cook (Ark. 1946), 66 S. Ct. 663, 327 U. S. 474, 90 L. Ed. 793;

Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 367, 53 S. Ct. 145 77 L. Ed. 360;

Brinkerhoff & Faris Co. v. Hill, 281 U. S. 673;

Missouri v. Gehner, 281 U. S. 313, 320;

Herndon v. Georgia, 295 U. S. 441, 443-444;

Saunders v. Shaw, 244 U. S. 317.

In addition, the latter cited five cases involve the issue of surprise as in the instant case the decision of the Utah Supreme Court introduced a factor unsuspected and unanticipated which factor could be for the first time raised in Petitioner's Petition for Rehearing.

Reasons for Granting Writ.

Petitioner is well aware that in determining whether to grant a petition for writ of certiorari this Court is influenced by whether or not the case involves principles the settlement of which is of importance to the public as distinguished from that of the parties (*Rice v. Sioux City Memorial Park Cemetery U. S.* (Iowa 1955), 15 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897) and also where there are "special and important reasons therefore." (Rule 19, Revised Rules of the Supreme Court of the United States.) This Court held in the above cited case that "special and important reasons" within Rule 19 relate to problems beyond the academic or episodic, especially where the issues reach constitutional dimensions. Petitioner believes that the instant case falls within the purview of that portion of Rule 19(a) dealing with a decision of a state court not in accord with applicable decisions of this Court. Further, Petitioner contends that the net effect of the decision of the Utah Supreme Court has cast such a cloud or created such confusion upon the orderly conveyancing, vesting, encumbering and obtaining of title policies and contract relating thereto of real property (and possibly other types of property) in Utah which property has been or will become directly or indirectly involved in connection with an action filed for separate maintenance or divorce (and even other types of actions affecting property rights) that such circumstances create "special and important reasons" for this Court to grant the writ of certiorari. Settlement of the issues or questions is plainly in the public's interest in order to avoid future litigation whch undoubtedly will be caused by the confusion and

conflict with federal and Utah statutory and case authority resulting from the decision of the Utah Supreme Court.

1. The Supreme Court of the State of Utah has decided a federal question of substance (whether Petitioner has been deprived of his property without due process of law) in a way not in accord with numerous applicable decisions of the Supreme Court of the United States. In fact, your Petitioner has been unable to find any case involving such a flagrant violation of due process as in the instant case where *no notice or process of any type was served either personally or constructively on the person whose property rights were to be determined.* The harshness of the denial of due process in the instant case is further magnified by the fact that your Petitioner's interest of record was known personally to exist by Respondent and her two co-counsel but yet they failed to mention your Petitioner's interest at the time of the default divorce hearing (contrary to the provisions of Section 78-40-13, Utah Code Annotated, 1953—see Appendix G, p. 20) and further Respondent's co-counsel failed to notify your Petitioner, either as a potential party defendant or as a fellow member of the bar that even an attempt would be made to determine Petitioner's interest in the subject property at the time of the default divorce hearing even though Petitioner's pre-existing interest of record was not mentioned in the pleadings of the second divorce action.

In order for the judicial system of the United States to prevail and to serve as an effective protector of an individual's rights as provided in the Constitution of

the United States and its Amendments and to instill confidence in the proper functions of the federal judicial system, state tribunals and judicial bodies must follow the law as expressed in said documents and as interpreted and construed by decisions of this Court. The decisions of this Court on the issues involved in the instant cases are clear and unequivocable and Petitioner in good faith believes that this court will conclude as he has that the Utah Supreme Court totally ignored the force and effect of federal law and the numerous decisions of this Court in point in rendering its decision. If the proper relationship between federal and state judicial systems as envisioned by the founders and subsequent judicial, executive and legislative leaders of our country are to be maintained it is absolutely essential that the decision of the Utah Supreme Court be examined by this Court and that if this Court agrees with your Petitioner's position, then said decision should be reversed and judgment entered in favor of your Petitioner. In this regard it should be noted that counsel for Respondent specifically stated he was satisfied with the evidence presented on Respondent's counterclaim [T. R. p. 66] and therefore in the event this Honorable Court agrees with your Petitioner's contention judgment should be entered in his favor without the necessity of a remand with a resulting retrial since any other result would merely prolong the litigation for no useful purpose which this Court has always looked upon with disfavor.

Petitioner was first denied due process of law as a result of the decision of the Supreme Court of Utah. The Supreme Court of Utah did not discuss numerous deficiencies in the findings, lack of *any evidence* to sup-

port certain findings or omissions of essential findings by the trial court (all such points having been raised) but rather held that because Petitioner knew at one time that there was a dispute between Dr. Dubin and Mrs. Dubin as to their rights in the subject property that your Petitioner was forever disabled from obtaining a valid conveyance from Dr. Dubin (not subject to being defeated in an action to which he was not a party or had no notice thereof of a possible determination of his rights as to his interest in the joint tenancy property) irrespective of whether or not the action pending at the time of conveyance was dismissed and irrespective of whether or not Petitioner's conveyance that he received was not fraudulent under Utath law. Actually the original action was at most still an action for separate maintenance which action is provided for in Section 30-4-4, Utah Code Annotated, 1953, attached hereto as Appendix D, p. 15, which inferentially or directly states that unless a restraining order against encumbering or disposing of the property is obtained that the other party to said action can so encumber or dispose of the property. The Utah Supreme Court held that your Petitioner obtained his interest of record, where Petitioner's rights in the default divorce action (filed after Petitioner obtained his interest of record) where Petitioner's grantor did not appear and in which action your Petitioner was not mentioned in the pleadings was not made a party to said action or in any way served with process or interpleaded or given any notice that his pre-existing rights of record in the property were to be determined in said action.

The Supreme Court of the United States has decided many cases in which the question or issue was

whether or not the type of notice given to a *party to an action* was sufficient to constitute due process of law. The instant case is extreme in that your Petitioner had his property rights determined and deprived from him in an action where *he was not a party* nor was he given *any notice* that his property rights were to be determined. Petitioner was unaware of the *lis pendens* dated December 10, 1959, until the date of the instant trial. Further, since the deed under which Petitioner asserts his rights was dated and recorded prior to the date of either the *lis pendens* of December 8, 1959 or December 10, 1959 it cannot be said that he was given any notice as a result of such *lis pendens* since a prior grantee does not have to keep himself advised as to later recorded claims against his property in most instances. Further, said *lis pendens* even if Petitioner is charged with constructive knowledge of their contents did not give Petitioner notice that *his rights* were to be determined in said action. A *lis pendens* cannot be used as a substitute for service of process or of notice. Further, in Utah a *lis pendens* does not create a lien on the property mentioned therein. (See Section 78-40-2, Utah Code Annotated, 1953, set forth in Appendix F, p. 19.) The instant case is a flagrant violation of due process in that Respondent and her two co-counsel had personal knowledge of the conveyance made to your Petitioner but yet deliberately proceeded to obtain a default divorce decree awarding all the property to Respondent free of the claims of Dr. Dubin and in doing so deliberately failed to notify the court as officers of the court of said fact and further failed to notify Petitioner that they intended to determine Petitioner's rights in the property even though they had Pe-

tioner's correct address. Further, the decision of the Utah District Court in the default divorce action decreed that Respondent took the property free and clear of the claims of Martin F. Dubin, yet the opinion of the Supreme Court has the net effect of enlarging the decree or judgment to provide that Respondent takes the property free and clear of claims of Martin F. Dubin *and* your Petitioner.

There are numerous cases squarely in point handed down by the Supreme Court of the United States. The United States Supreme Court has stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314, 315, 94 L. Ed. 865, 873, 874, 70 S. Ct. 652; *Covey v. Somers*, 351 U. S. 141, 146, 100 L. Ed. 1021, 76 S. Ct. 724;

> "An elemental and fundamental requirement of due process in any process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.
>
> "The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U. S. 385, 394, 58 L. Ed. 1363, 1368, 34 S. Ct. 779. This right to be heard has little reality or worth unless one is informed that

the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

In *Grannis v. Ordean*, 34 S. Ct. 779, 234 U. S. 385, 58 L. Ed. 1363, the United States Supreme Court stated:

"If in the action the court has jurisdiction over the res the judgment in order to be binding with respect to the interest of a non-resident who is not served with process within the state, must be based upon constructive notice given by publication, mailing or otherwise, substantially in the manner prescribed by the law of the state."

In *Griffen v. Griffen*, 66 S. Ct. 556, 327 U. S. 220, 90 L. Ed. 635, it was held that:

"Due process forbids any exercise of judicial power substantially affecting a defendant's rights without notice."

The court also stated that "Notice by personal or substituted service cannot, consistently with due process, be dispensed with, even in the case of judgment *in rem* with respect to property within the jurisdiction of the court rendering the judgment."

In *Hansberry v. Lee*, 61 S. Ct. 115, 311 U. S. 32, 85 L. Ed. 22, 132 A. L. R. 741, it was specifically held that the enforcement of a judgment against the person or property of one not designated as a party nor made a party by service of process, violates the due process clauses of the Fifth and Fourteenth Amendments. The court in said case stated that the procedure adopted by the court rendering the judgment sought to be enforced against a person must be examined to see

that such procedure fairly insures the protection of the interests of absent parties who are to be bound by such judgment. The court stated that the person sought to be bound by such judgment must be afforded such notice and opportunity to be heard as are requisite to "due process of law."

In *State of Missouri ex rel Hurwitz v. North*, 46 S. Ct. 384, 271 U. S. 40, 70 L. Ed. 818, it was held that *notice of suit* and opportunity for hearing are requisites of due process. See also *Lambert v. People of the State of California*, 78 S. Ct. 240, 355 U. S. 225; *Shelly v. Kraemer*, 68 S. Ct. 836, 334 U. S. 1, 92 L. Ed. 1161, 3 A. L. R. 2d 441.

In the instant case your Petitioner had no notice that his property rights would be determined at the time of the default divorce hearing and based upon the facts and circumstances and cases above cited it is clear that your Petitioner has been deprived of his property without due process of law. The reversal of the Utah Supreme Court's opinion is not only for the interest of Petitioner but the public generally because of the confusion flowing from such an opinion.

2. The writ of certiorari should be granted because of the "special and important reason" (Rule 19 of Revised Rules of the Supreme Court of the United States), that the force and effect of the decision of the Supreme Court of Utah is to render void or abrogate Section 30-4-4 of Utah Code Annotated, 1953 (Appendix D, p. 15) and Section 78-40-2 of Utah Code Annotated, 1953 (see Appendix F, p. 19) and thus may put past and future conveyances or encumbrances or contracts relating thereto made by parties to an action for

separate maintenance or divorce (or possibly other actions) invalid or subject to a cloud on the property's title irrespective of whether or not an order enjoining the disposal or encumbering the property involved in such action is obtained and irrespective of whether or not the conveyance or encumbrance is not subject to attack as a fraudulent conveyance or encumbrance. Said clouding of title or interference with contracts may effect foreign residents, interfere with interstate commerce, the orderly adjudication or settlement of lawsuits and further may impair the validity of contracts entered into by residents of Utah as well as residents of other States relating to real and personal property.

The opinion of Utah Supreme Court states that the original action for separate maintenance placed the property "within the jurisdiction of the court and submitted to it for adjudication." The Court further held that ". . . Dr. Dubin could not make any conveyance thereof except subject to adjudication by the court." The position of the Court is contrary to the Utah cases of *Adamson v. Adamson*; *supra*, *Neilson v. Neilson*, *supra*, and cases and authorities from other jurisdictions cited in Appellant's Brief at pages 23, 24, 25 and 27 through 34. Further, such position is contrary to the Utah *lis pendens* statute which only provides that a subsequent purchaser takes it with notice of the pendency of the action. (Appendix F.) Further the opinion of the Supreme Court of Utah abrogates Section 30-4-4 of Utah Code Annotated, 1953 (Appendix D), which provides that in an action for seperate maintenance the plaintiff can obtain a court order against defendant enjoining and restraining him from

disposing of or encumbering the property and that when said order is filed with the county recorder where the property is located "from the time of filing such order the property described shall be charged with a lien in favor of the plaintiff to the extent of any judgment which may be rendered in the action." It is obvious that the legislature intent was not to create a lien on the property involved until such an order had been obtained and recorded. The Utah case of *Adamson v. Adamson, supra,* is in accord. In the instant case no such order was obtained, and in fact, your Petitioner took this fact into consideration when he decided to cancel the $3,000 indebtedness owing to him by Dr. Dubin, to pay Dr. Dubin the sum of $100.00 and to execute a promissory note for $5,000 payable in favor of Dr. Dubin. There was no intent by your Petitioner to conceal the existence of said promissory note since the existence of the promissory note executed on December 7, 1959 was disclosed on said date to Respondent's counsel and the promissory note executed on December 8, 1959 was recorded.

The filing of a *lis pendens* under Utah law does not have the same effect. Section 78-40-2, Utah Code Annotated, 1953 (Appendix F, p. 19), provides that a *lis pendens* shall contain the names of the parties, the object of the action or defense, the names of the parties and a description of the property. The said code section provides "From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be *deemed to have constructive notice of the pendency of the action*, and only of its pendency against parties designated by their real names" (emphasis supplied). The force and effect of a *Utah lis*

pendens is thus quite different from that of an order enjoining and restraining disposal of or the encumbrancing of property obtained under Section 30-4-4 of Utah Code Annotated, 1953 (Appendix D, p. 15); in the former the effect is merely to give notice of the pendency of the action while in the latter the effect is to create a lien as to any judgment subsequently obtained in said action. In Respondent's Brief filed with the Utah Supreme Court, several cases are cited from foreign jurisdictions (*Ramsey v. Ramsey Kansas*, 90 P. 2d 1093; *Wilkinson v. Elliot*, 43 Kansas, 590, 23 Pac. 614; *Moore v. Zelic*, 338 Ill. 583, 170 N. E. 644 and *Goodson et al. v. Lehman* (N. C.) 35 S. E. 2d 623, but all of said cases are not in point since the *lis pendens* statutes of the various states therein involved are different from the *lis pendens* statute of Utah in that in the former states the *lis pendens* statute either creates a lien or as in *Moore v. Zelic supra*, the filing of the *lis pendens* under Illinois law had the effect of making every person taking title "bound by the proceedings to the same extent and in the same manner as if he were a party thereto" while the Utah *lis pendens* statute merely gives notice of the pendency of the action set forth in the *lis pendens*. It is obvious that the citation of cases involving *lis pendens* from foreign jurisdictions was done deliberately to mislead the Utah Supreme Court (in which effort Respondent has been successful up to this stage).

The opinion of the Supreme Court of Utah further confuses the law by failing to explain how your Petitioner's rights under the deed dated December 7, 1959 could be affected by a later filed action against Dr. Dubin who at the time of filing said action had pre-

viously conveyed his interest in the property to your Petitioner. Nowhere in the opinion of the Supreme Court is there any statement or indication that the conveyances made by Dr. Dubin were fraudulent within the meaning of the Fraudulent Conveyance Act, Section 25-1-8, Utah Code Annotated, 1953, *supra*, and Appendix E, p. 16. In Respondent's Brief, page 6, it is stated that it is not essential that Respondent establish that Dr. Dubin delivered the deed to your Petitioner with the fraudulent intent to deprive his wife of her rights. This statement is contrary to the aforesaid code section and Section 25-1-7 of Utah Code Annotated, 1953, *supra*, which requires a showing of *actual* fraudulent intent, and furthermore lacks basic logic. Respondent states that if your Petitioner had a "suspicion that Dr. Dubin acted with such a motivation" establishment of that fact alone is sufficient. This is not logical. Suppose, for example, your Petitioner had a "suspicion" that Dr. Dubin had such a motivation but, in fact, your Petitioner was wrong. Under the theory advanced by Respondent Dr. Dubin would be deprived of the benefits of his conveyance even though he was entirely innocent. It is for this reason that the Utah statute requires that the actual fraudulent intent of the grantor first be established.

As pointed out in Point III of your Petitioner's Brief to the Utah Supreme Court, pages 12 through 14, the decision of the Utah Supreme Court has the net effect of rending void or disabling the creation of any contract, conveyance or encumbrance affecting property mentioned in an action for divorce or separate maintenance (and possibly other types of actions involving property), irrespective of whether or not such contract,

conveyance or encumbrance is bona fide, for consideration and not subject to attack under the Fraudulent Conveyance Act, Section 25-1-8, Utah Code Annotated, 1953, *supra*, and Appendix E, p. 16. The Utah Supreme Court has therefore abolished the necessity of obtaining an order enjoining the disposal or encumbrancing of property in an action for seperate maintenance under Section 30-4-4, Utah Code Annotated, 1953 (Appendix D, p. 15); has by judicial legislation rewritten the Utah statute relating to the filing of a *lis pendens* so as to create a lien as to any judgment subsequently obtained contrary to the explicit statement in the statute that a *lis pendens* merely gives notice of the pendency of the action and further said Court has emasculated the Utah Fraudulent Conveyance Act by judicial legislation to eliminate many, if not all, of the essential elements to render void a conveyance or encumbrance when an action for divorce or separate maintenance is involved.

The net effect of the above three serious errors and the resulting effects of the decision of the Utah Supreme Court is to disable civilly either party to a divorce or separate maintenance action (and possibly other actions or commercial transactions involving real and personal property) from making any contract or conveyance affecting property described in the complaint to anyone personally aware of the action or to anyone (since a *lis pendens* gives constructive notice) even though such contract or conveyance be bona fide, made in the utmost good faith and not in any respect fraudulent. This is not the law in any other state and has not been the law in Utah as shown by the cases of *Adamson v. Adamson, supra, Neilson v. Neilson, supra* or the

leading California case of *Sun Life Insurance Co. v. White, supra* or by the numerous cases and authorities cited in your Petitioner's Brief filed with the Utah Supreme Court, pages 28 through 34, and the annotation found at 45 A. L. R. 2d 514 discussing attorneys' fees as affecting conveyances for value and consideration.

It is not hard to imagine the state of confusion which may have already evolved or will evolve if the opinion in the instant case is not reversed. Any creditor, lender, real estate broker or other businessman who has adequate legal counsel will be weary of making any contract relating to real property or property described in the statute (or even extending credit based upon the net worth of said party which includes said property) or owned by a couple who have filed an action for separate maintenance or divorce (or possibly other types of actions) and in which action a *lis pendens* has been filed or such contracting party has personal knowledge that the property is in dispute. Probably judicial notice can be taken that in every domestic action it is more than likely that property rights are involved as between the parties to said action.

Constitutionally the force and effect of the decision of the Utah Supreme Court may cause (1) the impairment of contracts previously executed or to be executed in the future, (2) deprive your Petitioner and others of their property rights without due process of law since a title policy on the property involved may be difficult if not impossible to obtain while the action is

pending and thus possibly cause diminution in value and loss of profits or cause a loss depending upon economic factors, (3) interfere with interstate commerce because of contracts or conveyances made or to be made in the future with residents in other states, (4) constitute a denial of equal protection of the laws or an infringement of the privileges and immunities of the Constitution of the United States as amended.

Your respondent is well aware that certain of the above constitutional issues were not presented in his Petition for Rehearing to the Supreme Court of Utah, but your Petitioner points out these additional constitutional issues in the hope that they will enter into the Court's decision whether or not to grant a writ of certiorari as to the constitutional issues raised with the Utah Supreme Court.

Petitioner believes while there is no question but that the opinion of the Utah Supreme Court was decided "in a way probably not in accord with applicable decisions of this court" (Rule 19(a) of the Supreme Court of the United States) that in addition to this reason for granting the writ the court should consider the aforementioned other "special and important reasons" for granting the writ. Said reasons exist and color the entire opinion of the Utah Supreme Court and should enter into this Court's determination whether to grant the writ although Petitioner believes the ground asserted to the Utah Supreme Court in itself is sufficient reason to grant the writ even though this Court may not have to

pass on any other constitutional issues. Petitioner believes that reversal of the opinion on the constitutional ground raised probably will resolve most, if not all, of the other constitutional issues.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted. Further, your Petitioner is of the opinion that if the writ is granted and the opinion reversed that there should not be a remand to the trial court since Respondent stated in open court through her counsel she was satisfied with her evidence. [T. R. p. 66.]

Respectfully submitted,

JOHN D. GLYNN,

Appearing in Pro. Se.

APPENDIX A.

Findings of Fact and Conclusions of Law and Decree of Salt Lake District Court.

In the District Court of Salt Lake County, State of Utah.

John D. Glynn, Plaintiff, vs. Marjorie Doctorman Dubin, a/k/a Marjorie Doctorman, and Deseret Federal Savings and Loan Association, a corporation, Defendants. Case No. 125317.

This matter came on regularly to be heard the 9th day of November, 1960; the matter having been scheduled for a jury trial but the jury having been waived by both the parties, and was tried before the Honorable Ray A. Van Cott, sitting without a jury; the Plaintiff appearing in person and being represented by himself as an attorney at law duly licensed to practice in the State of California but not in the State of Utah; the Defendant, Marjorie Doctorman Dubin appearing in person and by her counsel, Bernard L. Rose and Dean E. Conder, and evidence having been introduced and the Court being fully advised in the premises by both oral and documentary evidence; now makes and enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about the 22nd day of July, 1957, Martin F. Dubin and Marjorie D. Dubin acquired as joint tenants property known as All of Lot 24, East Millbrook No. 2 in the County of Salt Lake, State of Utah, according to the plat thereof, recorded in the Office of the County Recorder of said county.

2. During the month of January, 1959, a suit was filed in the Third District Court known as File No. 119467 entitled Marjorie Dubin vs. Martin F. Dubin in which suit the Plaintiff Marjorie Doctorman Dubin claimed all of the right, title and interest in and to said real property and prayed that the Court set over said property to herself.

3. At the time of the filing of the suit in Case No. 119467, a Lis Pendens was recorded in the Office of the County Recorder of Salt Lake County, State of Utah, and referred to said lawsuit and the said real estate herein described.

4. The Plaintiff herein, John D. Glynn, acted as the attorney for Martin F. Dubin in Case No. 119467 and was familiar with all of the pleadings and papers filed in said case and aquainted with the claim of Marjorie Dubin in and to said real property in connection with said lawsuit. On December 7, 1959, Martin F. Dubin executed and delivered to the Plaintiff John D. Glynn, a Quit-Claim Deed covering the property which is the subject matter of this lawsuit, and that the Deed was taken without the signature of Marjorie Dubin. At the time of the execution of the said Quit-Claim Deed, John D. Glynn was aware of the claims of the Defendant Marjorie Doctorman Dubin in and to said property and particularly to the fact that she claimed to have paid all of the down payment on said property in the amount of approximately $12,000.00 which was paid from funds of Marjorie Doctorman Dubin acquired before her marriage, and that Martin F. Dubin had made no payments in connection with said property. A trial was held before the Honorable A. H. Ellett in connection with the case of 119467 on

December 8, 1959, and at said trial the Honorable A. H. Ellett dismissed the action at 2:00 p.m. for the reason that the Court had no jurisdiction since the action was for divorce and the parties had not established sufficient residence, but the Court gave leave to file a new action. A new action was filed on December 8, 1959, in Salt Lake County, State of Utah, entitled Marjorie Dubin vs. Martin F. Dubin as File No. 123578 and in this action Marjorie Dubin again asserted her claim to the real property which is the subject of this lawsuit and asked that it be set over to her free and clear of any claim of Martin Dubin. In connection with this action, a Lis Pendens was recorded in the Office of the County Recorder, State of Utah, which Lis Pendens shows it was recorded at 1:45 p.m. and said Lis Pendens referred to this action and the property which is the subject of this lawsuit. A second Quit-Claim Deed was executed by Martin F. Dubin to John D. Glynn dated December 8, 1959, covering the property in dispute and that said Deed was recorded in the Office of the County Recorder Salt Lake County, State of Utah, at 4:29 p.m. Marjorie Dubin did not execute said Deed.

5. In connection w th the Deed dated December 7, 1959, a promissory note was executed by John D. Glynn in favor of Martin F. Dubin in the amount of $5,000.00 payable at the rate of $100.00 commencing January 7, 1960. In connection with the Deed dated December 8, 1959, a promissory note was executed on December 8, which is identical in terms with the note of December 7, 1959, and is not any new consideration.

6. On January 27, 1960, the Defendant herein Marjorie Dubin, in the case No. 123578 was given a Decree of Divorce from Martin F. Dubin, and in said Decree of Divorce, she was awarded as her sole and separate property free and clear of any claims of the Defendant, Martin F. Dubin, the real property which is the subject matter of this lawsuit. Although the Plaintiff herein did not appear as counsel for Martin F. Dubin in Case No. 123578, the Plaintiff herein represented he was the attorney for Mr. Dubin and made inquiry regarding status of the action in January of 1960.

From the foregoing Findings of Fact, the Court makes and enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Plaintiff herein took the property known as Lot 24, East Millbrook No. 2, according to the official plat of Salt Lake County, State of Utah, with knowledge of the claim of the Defendant Marjorie Doctorman Dubin, and the Plaintiff was not a Purchaser in good faith.

2. That the Plaintiff further took the property subject to the Lis Pendens filed in the two cases of Dubin vs. Dubin, Civil Nos. 119467 and 123578.

3. The property has properly been awarded to the Defendant Marjorie Doctorman Dubin.

4. The Plaintiff herein has no right, title or interest in and to the property, and the Defendant Marjorie Doctorman Dubin should have title to said property quieted against the claim of the Plaintiff.

Dated this 15 day of November, 1960.

/s/ RAY VAN COTT JR.
DISTRICT JUDGE

In the District Court of Salt Lake County, State of Utah.

John D. Glynn, Plaintiff, vs. Marjorie Doctorman Dubin, a/k/a Marjorie Doctorman, and Deseret Federal Savings and Loan Association, a corporation, Defendants. Civil No. 125317

DECREE

This matter came on regularly to be heard the 9th day of November, 1960; the matter having been scheduled for a jury trial but the jury having been waived by both the parties, and was tried before the Honorable Ray A. Van Cott, sitting without a jury; the Plaintiff appearing in person and being represented by himself as an attorney at law duly licensed to practice in the State of California but not in the State of Utah; the Defendant, Marjorie Doctorman Dubin appearing in person and by her counsel, Bernard L. Rose and Dean E. Conder, and evidence having been introduced and the Court being fully advised in the premises by both oral and documental evidence, having made and entered its Finding of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants have and are hereby given Judgment against the Plaintiff on Plaintiff's Complaint, no cause of action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, Marjorie Doctorman Dubin, a/k/a Marjorie Doctorman, be and she is hereby given Judgment against the Plaintiff quieting title in the Defendant and against the Plaintiff in and to the following described real property, situated in

Salt Lake County, State of Utah, more particularly described as follows:

All of Lot 24, East Millbrook No. 2 in the County of Salt Lake, State of Utah, according to the plat thereof, recorded in the Office of the County Recorder of said county.

Dated this 15 day of November, 1960.

/s/ RAY VAN COTT JR
District Judge

Served a copy of the foregoing Decree, together with a copy of the Findings of Fact and Conclusions of Law, upon the Plaintiff by mailing a copy to Plaintiff John D. Glynn, Attorney at Law, Citizens National Bank Building #203 9350 Wilshire Boulevard, Beverly Hills, California, and to his attorney, Ernest F. Baldwin, Jr., Kearns Building, Salt Lake City, Utah, this 14 day of November, 1960.

Karen Derrick

APPENDIX B.

Opinion of Utah Supreme Court and Ruling Denying Petition for Rehearing.

In the Supreme Court of the State of Utah.

Regular October Term, 1961 March 27, 1962.

John D. Glynn, Plaintiff and Appellant, v. Marjorie Doctorman Dubin, a/k/a Marjorie Doctorman, and Deseret Federal Savings & Loan Association, a corporation, Defendants and Respondents. No. 9388.

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court herein be and the same is, affirmed. Costs to respondent.

(ON PETITION FOR REHEARING)

Regular May Term, 1962 May 14, 1962

On consideration of the Petition for Rehearing heretofore filed herein, and the arguments of counsel thereupon had, it is ordered that a Rehearing be, and the same is, denied.

Issued: May 15, 1962

In the Supreme Court of the State of Utah.

John D. Glynn, Plaintiff and Appellant, v. Marjorie Doctorman Dubin, a/k/a Marjorie Doctorman, and Deseret Federal Savings & Loan Association, a corporation, Defendants and Respondents. No. 9388.

SNOW, District Judge:

Plaintiff appeals from a judgment dismissing his complaint for partition of real property and quieting title to it in the defendant, Marjorie Doctorman Dubin.

Plaintiff is an attorney at law who represented defendant's former husband, Dr. Martin F. Dubin, in a prior action in which Dr. Dubin's former wife, defendant Marjorie Doctorman Dubin, sued him first for separate maintenance, and after amendment, for a divorce. The action was commenced January 14, 1959, in which the complaint described the property in question, Lot 24, East Millbrook No. 2, Salt Lake County, as being owned in joint tenancy by the parties. And plaintiff therein asked that it be awarded to her. A proper notice of lis pendens on this property was filed with the county recorder on January 19, 1959.

On December 6, 1959, Dr. Dubin, together with the plaintiff Glynn his attorney, came to Salt Lake from California to attend the trial of the case, which was scheduled for December 8, 1959. On December 7, 1959, Dr. Dubin made a quitclaim deed of his interest in this property to plaintiff Glynn, reciting $100.00 and other valuable consideration, which it is indicated was for unpaid attorney's fees.

When the matter came on for trial the next day, December 8, 1959, before District Judge A. H. Ellett, the Defendant moved to dismiss the action on the ground that inasmuch as the complaint had been amended to seek a divorce; and that the plaintiff, in that action, Marjorie Doctorman Dubin, did not have the requisite three months' bona fide residence in Salt Lake County when the original complaint was filed, the court had

no jurisdiction of the action. The judge took the motion under advisement and recessed court until 2 p.m., when he would announce his ruling.

During the noon hour Marjorie D. Dubin filed a new action for divorce against Dr. Dubin, and filed a new notice of lis pendens on this property. When court reconvened at 2 o'clock, Judge Ellett entered an order dismissing the first action, indicating it was without prejudice to the rights of the parties to proceed in another action. Subsequent to this ruling, at about 4 o'clock in the afternoon, another quitclaim deed to the subject property from Dr. Dubin as grantor to the plaintiff Glynn as grantee was filed with the county recorder. Dr. Dubin and Mr. Glynn then left the jurisdiction before the defendant was able to serve process on them in the new action.

After Dr. Dubin was served personally with process in the state of California, and time for answer had elapsed and default was entered, the court granted a divorce to the plaintiff therein, Marjorie Doctorman Dubin, and against Dr. Martin F. Dubin, and among other things decreed as follows:

> "3. Plaintiff be, and she is hereby, awarded as her sole and separate property, free and clear of any claims of the defendant, the following described real property [describing it].
>
> "4. Any rights of the defendant be, and the same are hereby, extinguished and terminated in and to said property above described."

It is to be noted that in the action for separate maintenance there are numerous pleadings, including the complaint and counterclaim which designate the

"East Millbrook" property in question as being the property of the marriage and each party praying the court for a determination of interests in it: that it was within the jurisdiction of the court and submitted to it for adjudication. Of further significance is the fact that the plaintiff, John D. Glynn, as attorney for Dr. Dubin, was attorney of record in that action and fully aware of such facts. He also knew that there was a serious question as to what, if any interest Dr. Dubin might be entitled to in the property, not only because of claims his wife would normally have in the divorce action, but because of the allegations in the complaint that this property was purchased by her with funds acquired prior to her marriage to him. It is our opinion that this property being within the jurisdiction of the court, having been thus committed to it for the purpose of adjudication, Dr. Dubin could not make any conveyance thereof except subject to adjudication by the court.

The mischief that would follow if the parties to an action under such circumstances could alienate away property which is before the court for determination is obvious. It is equally plain that under the circumstances here shown, where the attorney, Glynn, was fully conversant with the facts hereinabove stated, under the quitclaim deed of Dr. Dubin's interest in the property, he could only take the property subject to whatever dispostion the court would make of it. The controlling and indisputable fact is that he had actual knowledge that the property in question was before the court for adjudication in the litigation which was being carried on between the parties. Inasmuch as the only interest in

the property he could take by the deed from Dr. Dubin was whatever interest the latter finally had adjudicated to him, and that turned out to be nothing, the trial court correctly dismissed his complaint and awarded judgment quieting title in said property to the defendant.

Affirmed. Costs to defendant (respondent).

We Concur:

Lester A. Wade, Chief Justice
F. Henri Henriod, Justice
Roger I. McDonough, Justice
J. Allan Crockett, Justice

Callister, J., having disqualified himself, does not participate herein.

United States of America.
State of Utah, County of Salt Lake ss.

I, L. M. Cummings, Clerk of the Supreme Court of the State of Utah, do hereby certify that the foregoing is a full, true and correct copy of the judgment rendered and opinion filed in the foregoing entitled action, now of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court this the 15th day of May A. D. 1962

.....
Clerk Supreme Court

By .....
Deputy Clerk

APPENDIX C.

Copy of Letter From John D. Glynn, Dated May 9, 1962 Addressed to Clerk, Supreme Court of Utah.

May 9, 1962

Clerk, Supreme Court
State of Utah
State Capitol Building
Salt Lake City, Utah

Re: Glynn vs. Doctorman, Case No. 9388

Dear Sir:

I am in receipt of letter dated May 7, 1962, signed by Bernard L. Rose over the signature typed in of Bernard L. Rose and Dean E. Condor in which it is stated that the attorneys for the Defendants and Respondents in the above referred matter do not care to answer or further argue in connection with Appellant's Petition for Rehearing and Supporting Brief since they allege that the matters referred to therein have been exhaustively argued by prior brief or based upon new points of law.

It will be appreciated if you will circulate copies of this letter together with copies of Appellant's Petition for Rehearing to each of the Justices of your Court. The principal reason for this letter and the requested circulation thereof is to insure that each of the Justices of the Court are fully aware that it is Appellant's position as stated in Appellant's Petition for Rehearing that the Points set forth in the Petition for Rehearing

first flow from and arise out of the decision of the Utah Supreme Court. The United States Supreme Court has repeatedly held that under such circumstances it is entirely proper to raise such points in a Petition for Rehearing, and the fact that they were not raised earlier is immaterial. Further, irrespective of the constitutional question under the Fourteenth Amendment to the Constitution of the United States it is incumbent upon and entirely proper for Appellant in his Petition for Rehearing to point out the serious defects in the decision of the Utah Supreme Court in order to enable the Court to reconsider the propriety of its decision based upon applicable facts and law, and in the instant case to enable the Court to reconsider the matter because of the force and effect of its decision on previous Utah Supreme Court cases and its invalidation or abrogation of two sections of the Utah Code Annotated, 1953, as alleged in Points 2 and 3 of the Petition for Rehearing.

While Utah Rules of Civil Procedure do not provide for a Reply Brief by Appellant on appeal, it is the opinion of Appellant that it is necessary to write this letter to you for circulation to Justices of the Court in order to insure that there can be no question as to the position of Appellant. Appellant hopes that the fact that this letter is being written in response to a letter by Respondent's counsel it will be received in the right context and will not act adversely as to a decision on his Petition for Rehearing. In view of the

fact that the letter from Respondent's counsel contains argumentative matter, it would appear that Appellant's response thereto would be justified.

Thank you for your most helpful and courteous co-operation and extension of favors in the past.

Very truly yours,

FREEMOND, GLYNN & MAIZLISH

JOHN D. GLYNN

JDG:gib

The undersigned mailed a true copy of the foregoing to Bernard L. Rose and Dean E. Condor, the attorneys for the Respondent, Marjorie Doctorman Dubin, at 55 East 4th South, Salt Lake City, Utah.

Gaye W. Herrington

APPENDIX D.

Section 30-4-4, Utah Code Annotated, 1953.

Action for Separate Maintenance

Restraining Disposal of Property:

"At the time of filing the complaint mentioned in section 30-4-1 or at any time subsequent thereto, the plaintiff may procure from the court, and file with the county recorder of any county in the state in which the defendant may own real estate, on order enjoining and restraining the defendant from disposing of or encumbering the same or any portion thereof, describing such real estate with reasonable certainly and from the time of filing such order the property described therein shall be charged with a lien in favor of the plaintiff to the extent of any judgment which may be rendered on the action."

APPENDIX E.

Sections 25-1-8; 25-1-9; 25-1-15; 25-1-16; 25-1-3; 25-1-1; Utah Code Annotated, 1953.

Title 25, Utah Code Annotated, 1953

Fraud

Chapter I

Fraudulent Conveyances

25-1-8 *When conveyance or assignment void.* — Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or in goods or things in action, or of rents or profits arising therefrom, and every charge upon lands, goods or things in action or upon the rents or profits thereof, made with the intent to delay, hinder or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands, and every bond, and every bond or other evidence of debt given, suits commenced, or decree or judgment suffered, with the like intent, as against the person hindered, delayed or defrauded shall be void.

25-1-9 *Defrauding prior or subsequent purchasers — Effect of notice at time of purchase.* — Every conveyance of any estate or interest in lands, or the rents or profits of lands, and every charge upon lands, or the rents or profits thereof, made or created with intent to defraud prior or subsequent purchasers thereof for a valuable consideration shall be void as against such purchasers. But no such conveyance or charge shall be deemed fraudulent in favor of a subsequent purchaser who had actual or constructive notice thereof at the time of his purchase, unless it appears

that the grantee in such conveyance or the person to be benefitted by such charge, was privy to the fraud intended.

25-1-15 *Rights of creditors with matured claims.* — Where a conveyance or obligation is fraudulent as to creditor, such creditor, when his claim has matured, may as against any person, except a purchaser for fair consideration without knowledge of the fraud at the time of purchase or one who has derived title immediately or mediately from such a purchaser:

(1) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim; or

(2) Disregard the conveyance, and attach, or levy execution upon the property conveyed.

A purchaser who without actual intent has given less than a fair consideration for the conveyance or obligation may retain the property or obligation as security for repayment.

25-1-16 *Rights of creditors with claims not matured.* — Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured, he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded, had his claim matured, and the court may:

(1) Restrain the defendant from disposing of his property;

(2) Appoint a receiver to take charge of the property;

(3) Set aside the conveyance or annual the obligation; or;

(4) Make any order which the circumstances of the case may require.

25-1-3 *Fair consideration.* — Fair consideration is given for property, or obligation;

(1) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied; or

(2) When such property, or obligation, is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small when compared with the value of the property or obligation obtained.

25-1-1 *Definitions*—in this chapter:

* * *

"Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

APPENDIX F.

Section 78-40-2, Utah Code Annotated, 1953.

Chapter 40

Quiet Title

78-40-2 *Lis pendens.* — If any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing is answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

See 54 CJS. Lis Pendens §27.

APPENDIX G.

Section 78-40-13, Utah Code Annotated, 1953.

78-40-13 *Judgment on default.—Court must require evidence—Conclusiveness of judgment.* When the summons has been served and the time for answering has expired, the court shall proceed to hear the cause as in other cases, and shall have jurisdiction to examine into and determine the legality of plaintiff's title and of the title and claims of all the defendants and of all unknown persons, and to that end must not enter any judgment by default against unknown defendants, but must in all cases require evidence of plaintiff's title and possession and hear such evidence as may be offered respecting the claims and title of any of the defendants and must thereafter enter judgment in accordance with the evidence and the law. The judgment shall be conclusive against all the persons named in the summons and complaint who have been served and against all such unknown persons as stated in the complaint and summons who have been served by publication.